UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WENDT CORPORATION,

Respondent,

and

SHOPMEN'S LOCAL UNION #567,

Petitioner.

Consolidated Case No. 03-CA-212225, 03-CA-220998, 03-CA-223594

RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Respondent Wendt Corporation ("Respondent" or "Wendt") submits the following Reply Brief in response to the General Counsel's ("GC") Brief in Opposition to Respondent's Exceptions ("GC Brief").

POINT I

A. The GC Admits That The ALJ Violated Respondent's Due Process Rights. (Exception 5)

The GC in a footnote simply states that it will not take a position on whether the ALJ violated the Respondent's due process rights when he found that the February 2018 layoff violated Section 8 (a) (3). Notably, the GC does not dispute that the Region investigated the charge by the Union that the Respondent "manufactured" the need for the layoff and found that it lacked merit, and that the ALJ ignored the evidence of this determination which was part of the record. The failure by the GC to respond requires more than a reversal of the ALJ's decision. Based on the GC's admission that the ALJ was willing to violate Respondent's due process rights—not once, but twice [1] during these proceedings—calls into question all of the ALJ's rulings, including his findings with respect to the credibility of the witnesses.

POINT II

A. Raytheon Applies Regardless of When or How A Past Practice Developed (Exceptions 1, 10, 14, 15 and 16)

The ALJ **never** mentioned the Board's decision in *Raytheon*. Nevertheless, the GC asserts that the ALJ "correctly" determined that *Raytheon* does not apply to the negotiation of an initial contract. The Board in *Raytheon* reaffirmed that under the Supreme Court's decision in *NLRB v. Katz,* 369 U.S. 736, 82 S. Ct. 1107 (1962) (hereinafter "*Katz*")—absent material and

[1] This was not the only instance in which the ALJ – at the urging of the GC – violated the Respondent's due process rights during these proceedings. As the Board is aware the ALJ permitted the GC to amend the Complaint mid-hearing to allege that Respondent's counsel violated the Act during cross-examination of a witness. This necessitated a special appeal to the Board which was granted.

substantial changes—an employer may continue its past practices during the negotiation of a contract. As in this case, *Katz* was decided in the context of the negotiation for an initial contract. Thus, the GC's claim that the ALJ "correctly" determined that *Raytheon* does not apply during the negotiation of an initial contract is wholly nonsensical. The absurdity of the GC's argument is underscored by the fact that, in *Raytheon,* the Board expressly directed that "**henceforth, regardless of the circumstances under which a past practice developed ….** an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past." *Id* at p. 16. (emphasis added). *Accord*, *Raytheon* at 13.

The GC's Brief[2] simply confirms that the ALJ deliberately refused to follow the dictates of the Board that necessitated applying *Raytheon.* While this alone requires reversal of the ALJ's decision, we have briefly addressed below the GC's claims that Respondent did not have a past practice of layoffs, employee discipline or performance of shop work by supervisors, as well as its claim that Respondent was obligated to bargain to overall impasse before it could follow its past practice of economic layoffs.

B. The GC's Claim of a Lack of Past Practices Confirms That the ALJ Refused to Apply Raytheon. (Exceptions 1, 10, 14, 15 and 16)

The ALJ found that Respondent had a past practice of economic layoff, progressive discipline, and supervisors performing the same work as bargaining unit members. See JD 28:1 to 5; JD 25:10 to 18; JD 42:17 to 26; JD 25:35 to 41. Despite these findings, the GC asserts without any citation to the record, that "...the actions Respondents claim are past practices are

[2] The GC's claim that the ALJ determined that the application of *Raytheon* would permit employers to "freely continue implement changes as if the union were not even there ..." misstates the Board's holding in *Raytheon.* Under *Raytheon,* an employer remains obligated to bargain if it changes its past practices. In addition, as the Board made clear in *Raytheon,* and as evidenced by the facts in this case, a union is always free to demand that the employer bargain to change a past practice.

not past practices at all." The sole basis for this claim of a lack of a past practice was that "there was no union with which it [Respondent] could bargain…."[3] GC Brief at 4. Notably, the GC did not find this lack of a union as an impediment to Respondent's having a past practice of periodic reviews and raises. In *Raytheon,* the Board rejected this very argument—that past practices to which a union objects were extinguished in the absence of a CBA, while practices which benefited its members remained in effect. As the Board stated, this "is irreconcilable with *Katz"* and, under *Katz,* an employer may continue **all of its past practices** during the negotiation of a contract regardless of who they benefit or how they came about. *Raytheon, supra,* 365 N.L.R.B. at 15 to 16.

Equally unavailing is the GC's claim—which has no support anywhere in the ALJ's decision—that there was no past practice of performance of shop work by supervisors on grounds that this position was not created until after the certification of the unit.[4] To the contrary, the record showed that, while the job title changed from "foreman" to "supervisor," it had the same meaning and encompassed the same job duties. (TR 129, 130, 1502, 1682-1683) This is not the type of material and substantial change needed to trigger an obligation to bargain under *Raytheon.* Completely absent from the GC's response is any finding by the ALJ or citation to the record evidence that there was a material and substantial change in the amount of shop work being performed by non-unit members or that any change had a measurable effect on the unit. *Northstar Steel Co. and International Union,* 347 N.L.R.B. 1364, 1367 (2006); *Alamo Cement Co.,* 281 N.L.R.B. 737, 738 (1986); *Flambeau Airmold Corp.*, 334 N.L.R.B. 165 (2001).

[3]The Board can easily reject the GC's claim of a lack of past practices of layoff, since the GC itself conceded the existence of this past practice in its own post-hearing brief. Post Hearing Brief 24-25; *see also*, Respondent's Opening Brief at p. 11. Similarly, Respondent's Employee Handbook which contains a progressive discipline policy contradicts the GC's claim of a lack of past practice of employee discipline. GC Ex. 50-51.

[4] The ALJ concluded that the advent of the Union extinguished this past practice with respect to some but not all of Respondent's supervisors. *See* Respondent's Opening Brief at 31. This simply reinforces that the ALJ's actual erroneous holding was that the Union has the unilateral right to selectively extinguish past practices.

In summary, the GC's arguments of a lack of past practices confirm that—like the ALJ—the GC is simply refusing to apply *Raytheon.* The GC's Brief also confirms that under *Raytheon* no change occurred to either of Respondent's past practices of progressive discipline or having supervisors and other non-unit employees perform the same work as unit employees. Hence, there was no trigger of an obligation to bargain or any demand by the Union for bargaining.

Because the Union never demanded bargaining to change either the past practice of supervisors performing the same work as bargaining unit members, or to change the past practice of employee discipline, the Respondent was free to continue these practices under *Katz* and *Raytheon*. Hence, the ALJ's finding of Section 8 (a) (5) violations must be reversed.

As set forth in Respondent's Opening Brief and as discussed below, because the Union did demand bargaining to change past practices with respect to layoffs and periodic raises/reviews, the issues before the Board are twofold. First, did the Respondent meet its obligations under *Raytheon* to bargain with respect to those practices in good faith with respect to the layoffs and wage increase? Second, as the ALJ found and the GC advocates, are employers subject to different standards depending on whether the past practice in question benefits the union or the employer? As discussed below, and as the Board stated in *Raytheon,* the ALJ's answers to these questions pose an irreconcilable departure from *Katz*.

POINT III

A. Under Raytheon, Once Bargaining Was Demanded for Changes to the Past Practice of Lay-Offs Well-Settled Board Law Governing Bargaining and Impasse Applies. (Exceptions 1, 2, 3, 4)

The only argument advanced by GC is that *Raytheon* does not apply, and that absent an economic emergency Respondent was prevented from doing precisely what it had done in the past lay-off employees during production slowdowns until there was either a complete agreement

or overall impasse. As set forth in Respondent's Opening Brief and as reiterated above, the Board has already found that this "… **is contrary to *Katz* and to the Board's obligation to foster stable labor relations, and it was clearly not intended by Congress**." *Raytheon, supra*, 365 N.L.R.B. at 172 (emphasis added).

As set forth in Respondent's Opening Brief, in light of *Raytheon*, if a union demands bargaining to change a past practice which involves periodic action by the employer at discrete times and that is amenable to bargaining prior to implementation, an employer may—and in fact should—defer implementation until the parties reach an agreement or impasse on the practice in question. At that point, the general rules governing good faith bargaining and the right to implement when impasse is reached on the practice subject to bargaining can easily be applied. Under this standard, the only argument made here by the GC—without any citations to the record—was that the parties had not reached impasse on the issue of layoffs.

This argument can be easily rejected. The record shows that the parties engaged in extensive bargaining and Respondent agreed to virtually all of the changes requested by the Union to its past practices.[5] The parties bargained until the date of the scheduled layoff. The only reason an agreement was not reached was the Union's regressive bargaining in demanding additional concessions on the eve of the deadline for the layoff. (TR 112 and R. 2 at p. 16 (Union proposal adding two new conditions)). As a result, under well-settled rules governing a party's obligation to bargain, the Respondent more than met its obligations under Section 8 (a) (5), when upon reaching impasse with respect to the layoff, it implemented its final offer.

[5] Respondent agreed to significant changes to its past practices under which the Respondent had complete discretion in selecting employees for layoff and did not provide a guarantee either as to the date of recall or even the right to recall. These changes to the Respondent's past practices included agreeing to lay off by seniority, committing to a specific return to work date, and agreeing not to permit overtime during the layoff. R. 2.

B. The ALJ's Application of the Adverse Inference Rule Was an Abuse of Discretion and Confirms His Bias. (Exceptions 2, 3 and 4)

Although Respondent was not required under *Raytheon* to prove the need for the layoff, it would like to briefly respond to the GC's claim that the ALJ properly disregarded the testimony of the Respondent's witnesses regarding the need for the layoff under the adverse inference rule.[6] The adverse inference rule is not mandatory and the Board reviews the application of the rule based on an abuse of discretion. *Quicken Loans, Inc. and Austin Laff*, 368 N.L.R.B. No. 112 (2019); *Parksite Group*, 354 N.L.R.B. 801, 804 (2009). The GC does not dispute[7] that the record before the ALJ established that the Region, after reviewing the documents Respondent had provided to the Union on the need for the layoff and deposing one of Respondent's witnesses, concluded that it could **not support** taking to complaint the Union's charge that Respondent "manufactured the need for the layoff." See Respondent's Opening Brief at pp. 9-12. In short, the GC admits that the record before the ALJ was that the Region had concluded that the documents in question would have **supported—**not contradicted—the testimony of the witnesses.[8] It is difficult to imagine an even greater abuse of discretion than for an ALJ to use the adverse inference rule to discredit testimony, when the record evidence before him supported the exact opposite inference.

Even more troubling is the clear bias demonstrated by the ALJ when he failed (a) to draw a similar adverse inference concerning the GC's failure to introduce these very same documents to support his claim that the layoff was not necessary; and (b) to apply the adverse inference rule

[6] The Board need not reach this issue given that the GC has not disputed that, if *Raytheon* applies to this case, then Respondent was not obligated to demonstrate the need for the layoff under *RBE Electronics of S.D. Inc.*, 320 N.L.R.B. 80 (1995).

[7] The GC also did not dispute that it had the documents at issue and that it did not introduce them to challenge the testimony of the Respondent's witnesses.

[8] As set forth in Respondent's Opening Brief, given that the GC and Region had already concluded that the Respondent had a business need for the layoff and the number of claims and length of the hearing, Respondent did not introduce cumulative evidence on what it believed was an issue which was not in dispute.

when the GC failed to introduce the Union's bargaining notes in connection with the Union's claim that it had not waived further bargaining with respect to wages. See discussion *infra*. In summary, not only did the GC fail to explain how it is not an abuse of discretion for the ALJ to draw an inference which was contradicted by the record evidence, but the GC's Brief confirms the presence of extraordinary circumstances warranting the Board's rejection of the ALJ's findings with respect to credibility.

POINT IV

A. The GC Completely Ignores the Extraordinary Circumstances Which Warrant Setting Aside the ALJ's Finding That the Union Did Not Waive Further Bargaining. (Exception 6)

The GC simply does not address the record evidence identified by Respondent which demonstrates the existence of extraordinary circumstances in which the ALJ's decision to credit the testimony of the Union's witnesses was against the preponderance of the evidence. *International Longshoremen's Association, Local 218, (Ceres Gulf, Inc.),* 366 N.L.R.B. No. 20 (2018) and *Audio-Visual Services Group, Inc.*, 367 N.L.R.B. 103 (2019).

For example, the GC did not address the fact that the ALJ's crediting of the testimony of the witnesses that the Union had not accepted the Respondent's proposal, was directly contradicted by his own finding that Respondent violated Section 8 (a) (5) by obtaining the Union's "acquiescence" or agreement to that very same proposal by threatening to withdraw the retroactivity portion of its wage proposal. See JD 34:1 to 9. Nor did the GC address the documentary evidence demonstrating that **after the wage proposal was accepted** the Union limited its requests for documents to the open issue of employee evaluations. Respondent's Opening Brief at 26, and GC 10.

B. The GC Failed To Respond to Respondent's Exceptions to the ALJ's Findings That Respondent Violated Section 8 (a) (5) and 8 (a) (3) In Connection With the Employee Raises and Reviews. (Exceptions 7, 9, 10, 11, 12)

The GC once again ignored *Raytheon* and failed to respond to the grounds for Respondent's exceptions to the ALJ's finding that Respondent allegedly violated Sections 8 (a) (3) and 8 (a) (5) when it negotiated with the Union with respect to performance review and wage increases. In fact, the GC failed to address the actual basis for the ALJ's findings.

This is not surprising since the basis of the ALJ's finding that Respondent violated Section 8 (a) (5) was that Respondent had secured the Union's "acquiescence" to its wage proposal by threatening to rescind the retroactivity portion of its wage proposal. The GC does not dispute that this was factually unsupported by the record since the Respondent's offer—on its face—was open for several weeks. See Respondent's Opening Brief at pp. 25 to 26. Similarly, the GC does not try to defend the ALJ's finding that Respondent violated Section 8 (a) (3) based on his finding that Respondent was required to both provide increases in accordance with its past practice and negotiate to change those practices. This finding is both inconsistent with and contrary to the Board's holding in *Raytheon* and—on its face—is inherently contradictory.

Instead, the GC simply misstates the record and seeks to impose on Respondent obligations that are nowhere to be found in the ALJ's decision, the Act or Board law. First, the GC misstates the record, claiming that the Union requested that the Company continue its past practice of discretionary wage increases based on annual reviews. The actual text of the request stated: "Please conduct reviews, provide us the results… and the amounts of each employees wage increases. We then would like **to bargain over the process and wage amounts before they are implemented."** GC 6. (emphasis added). Thus, contrary to the GC's claim the Union did not request that Respondent continue its past practice of reviews and discretionary wage

increases and, instead, expressly demanded that the Respondent bargain **to change those past practices.** [9] As set forth in Respondent's Opening Brief, in light of the Union's express request to change its past practice, under *Raytheon*, the Respondent could, without violating Section 8 (a) (3), defer implementation of reviews and wage increases pending a resolution of the bargaining for a change to the practice. Respondent's Opening Brief at pp. 21-24. Indeed, by characterizing the Union's request as one to continue the past practice, rather than bargain, the GC recognizes the error committed by the ALJ in finding that Respondent was required under Section 8 (a) (3) to grant the wage increases using the practice rejected by the Union.

The remainder of the GC's arguments simply confirm the errors committed by the ALJ and that the GC is relying on findings that were not part of the ALJ's decision. The GC illogically claims that Respondent "never offered" what it was providing to non-unit employees. GC Brief at 10. This simply ignores the fact it was the Union **who rejected the Respondent's past practice of discretionary** wage increases which were determined at Respondent's sole discretion.[10] Not surprisingly, the ALJ did not consider this relevant to his decision since nothing under the Act, or the Board's decisions requires a Respondent, once it receives a demand to bargain, to offer unit members what it is providing non-unit members. Indeed, there was no evidence that under Respondent's past practice the amount of wages increases for shop employees and non-shop employees was in any way similar or related. Similarly, while the GC references the fact that Respondent did not make a proposal until May, it should be noted that it was the Union **who demanded bargaining** and it was incumbent on the Union to come forth

[9] The Union's request both demanded the continuation of the past practice and that Respondent negotiate changes to the past practice, placing the Respondent in a Catch-22 whereby following the past practice would violate Section 8 (a) (5), while not following the past practice would violate Section 8 (a) (3).

[10] Moreover, this argument is nonsensical since the wage increases provided to non-unit members are unique as to each employee and, therefore, it would be impossible to "offer" these to the unit members collectively.

with its proposal first. Notably, again the ALJ did not find that this delay by both parties[11] in exchanging proposals was the basis for his finding of a violation of Section 8 (a) (5) or Section 8 (a) (3). [12]

REMAINING ARGUMENTS BY GC

Respondent will otherwise rely on its Opening Brief in Support of its Exceptions.

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[11] The record shows that, between November and May, the parties engaged in negotiations over the terms of the layoff, as well as continued efforts to negotiate an overall contract.
[12] The GC's arguments with respect to the remedy simply confirm the error committed in finding a violation of Section 8 (a) (3), when the parties were engaged in bargaining over the amount and process for the wage increases.